

Kumpulan Hartanah Selangor Bhd v Joginder Singh & Co A
(suing as a firm)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B
W-02(IM)-2353 OF 2009
ZALEHA ZAHARI, SULAIMAN DAUD AND AZHAR MA'AH JJCA
17 JUNE 2011

*Companies and Corporations — Separate legal entity — Lifting the veil of C
incorporation — Third defendant wholly owned subsidiary of first defendant —
Whether first defendant and third defendant were separate legal entities —
Whether first defendant was jointly and severally liable for debts of third defendant
— Whether circumstances of case warranted lifting of corporate veil D*

*Contract — Construction — Undertaking — Whether memo could be construed E
as undertaking by first defendant to pay third defendant's legal fees — Whether trial
judge erred in construing memo to be undertaking*

Joginder Singh and Co ('the plaintiff') charged its client Brisdale Rasa Development ('the third defendant') legal fees of RM2,362,5000 ('the legal fees') for acting for the latter in a civil suit, in which the third defendant obtained judgment in the sum of RM19,320,673. The third defendant, a wholly owned subsidiary of Kumpulan Hartanah Selangor Bhd ('the first defendant'), was advised by the first defendant that the plaintiff's claim for the legal fees was extremely excessive. By way of a memo ('the memo'), the legal manager of the first defendant advised the third defendant not to proceed with any settlement of property or payment arrangement with the plaintiff, in respect of the legal fees. The plaintiff claimed that thereafter a meeting was arranged between the plaintiff and the first defendant's senior management to discuss the legal fees, wherein the plaintiff had agreed to give the third defendant a discount on the unpaid legal fees and to accept payment of the fees part in property and part in cash. The discussion that took place in this meeting and the arrangement allegedly reached between the first defendant and the plaintiff was set out in a letter from the plaintiff addressed to the first defendant. The third defendant replied to the plaintiff's letter by requesting the plaintiff to deal directly with the third defendant in respect of the unpaid legal fees, without involving the first defendant. The plaintiff then commenced legal proceedings against the third defendant, the first defendant and Brisdale Holdings Bhd ('the second defendant'), another wholly owned subsidiary of the first defendant, for the unpaid legal fees. It was the plaintiff's case that the first defendant had undertaken to pay the legal fees and that it was estopped from denying liability by reason of having issued the memo. The trial judge F
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- A found that the memo from the first defendant to the third defendant to be an undertaking by the former to pay the plaintiff's legal fees. As such, the High Court found the first defendant liable for the third defendant's debts. This was the defendants' appeal against that decision. The defendants submitted that the trial judge had erred in construing the memo to be an undertaking by the first defendant to pay the legal fees. The defendants further submitted that the trial judge had erred in lifting the corporate veil to make the first defendant jointly and severally liable for the debts of the third defendant.

Held, allowing the appeal with costs:

- C (1) After careful consideration of the facts of this case and the contents issued by the first defendant it was found that the trial judge had failed to take cognizance of the fact that the entity who had retained the plaintiff in the civil suit was not the first defendant but the third defendant, a separate legal entity (see para 18).
- D (2) The memo relied upon by the plaintiff to support its contention that the first defendant had undertook to pay the third defendant's legal fees was an internal memo between the first and third defendants. This memo could not be construed as an undertaking by reason of it not being addressed to the plaintiff. Further, in giving effect to the contents of the memo, the true position was that further discussions and negotiations were envisaged in respect of the legal fees to be paid to the plaintiff and how such payment was to be effected. In the circumstances the trial judge had erred in the construction to be given to the memo, and the question of lifting the corporate veil to make the first defendant jointly and severally liable for the debts of the third defendant did not arise (see paras 19–20).

[Bahasa Malaysia summary]

- G Joginder Singh dan Co ('plaintif') mengenakan bayaran kepada pelanggannya Brisdale Rasa Development ('defendan ketiga') fi perundangan sejumlah RM2,362,5000 ('fi perundangan') kerana bertindak untuk defendan ketiga dalam tindakan sivil, di mana defendan ketiga memperoleh penghakiman dalam jumlah RM19,320,673. Defendan ketiga, subsidiari yang dimiliki oleh
- H Kumpulan Hartanah Selangor Bhd ('defendan pertama'), dimaklumkan oleh defendan pertama bahawa tuntutan plaintif untuk fi perundangan adalah amat berlebihan. Melalui memo ('memo'), pengurus perundangan defendan pertama menasihatkan defendan ketiga untuk tidak meneruskan dengan apa-apa penyelesaian hartanah atau penyusunan bayaran dengan plaintif, berkenaan dengan fi perundangan. Plaintif menuntut bahawa kemudiannya mesyuarat diadakan di antara plaintif dan pihak pengurusan kanan defendan pertama untuk berbincang mengenai fi perundangan di mana plaintif telah bersetuju untuk memberi kepada defendan ketiga diskaun ke atas fi perundangan yang belum dibayar dan untuk menerima pembayaran fi

sebahagian dalam hartanah dan sebahagian dalam tunai. Perbincangan yang dibincangkan dalam mesyuarat ini dan pengaturan yang didakwa dicapai di antara defendan pertama dan plaintif dinyatakan di dalam surat daripada plaintif dialamatkan kepada defendan pertama. Defendan ketiga menjawab surat plaintif dengan meminta plaintif berurusan terus dengan defendan ketiga berkenaan fi perundangan yang belum dibayar, tanpa melibatkan defendan pertama. Plaintif kemudiannya memulakan prosiding perundangan terhadap defendan ketiga, defendan pertama dan Brisdale Holdings Bhd ('defendan kedua'), satu lagi subsidiari yang dimiliki oleh defendan pertama untuk fi perundangan yang belum dibayar. Ia adalah kes plaintif bahawa defendan pertama telah berjanji untuk membayar fi perundangan dan bahawa ia diestop daripada menafikan liabiliti atas sebab mengeluarkan memo tersebut. Hakim bicara mendapati bahawa memo daripada defendan pertama kepada defendan ketiga sebagai perakuan oleh defendan pertama untuk membayar fi perundangan plaintif. Oleh itu, Mahkamah Tinggi mendapati defendan pertama bertanggungjawab untuk hutang defendan ketiga. Ini adalah rayuan defendan-defendan terhadap keputusan tersebut. Defendan-defendan berhujah bahawa hakim bicara telah tersilap dalam mentafsirkan memo tersebut sebagai perakuan oleh defendan pertama untuk membayar fi perundangan. Defendan-defendan selanjutnya berhujah bahawa hakim bicara telah tersilap dalam menyingkap tabir penubuhan untuk membuatkan defendan pertama bersesama dan berasingan bertanggungjawab ke atas hutang defendan ketiga.

Diputuskan, membenarkan rayuan dengan kos:

- (1) Selepas pertimbangan teliti fakta kes ini dan isi kandungan yang dikeluarkan oleh defendan pertama ia didapati bahawa hakim bicara telah gagal untuk mengambil perhatian kepada fakta bahawa entiti yang mengekalkan plaintif dalam tindakan sivil bukan defendan pertama tetapi defendan ketiga, entiti perundangan berasingan (lihat perenggan 18).
- (2) Memo yang digunakan oleh plaintif untuk menyokong hujahannya bahawa defendan pertama telah berjanji untuk membayar fi perundangan defendan ketiga adalah memo dalaman di antara defendan pertama dan ketiga. Memo ini tidak boleh ditaksirkan sebagai pengakuan atas sebab ia tidak dialamatkan kepada plaintif. Selanjutnya dalam memberi kesan kepada isi kandungan memo, kedudukan sebenar adalah bahawa perbincangan dan perundingan lanjut dibayangkan berkenaan fi perundangan yang perlu dibayar kepada plaintif dan bagaimana bayaran sedemikian patut dijelaskan. Dalam keadaan ini hakim bicara telah tersilap dalam pentafsiran yang patut diberikan kepada memo tersebut, dan soalan menyingkap tabir penubuhan untuk membuat defendan pertama bersesama dan berasingan bertanggungjawab untuk hutang defendan ketiga tidak berbangkit (lihat perenggan 19–20).]

A Notes

For cases on construction in general, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3656–3659.

For cases on lifting the veil of incorporation, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 865–893.

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Appeal from: Originating Summons No S2–24–65 of 2007 (High Court, Kuala Lumpur)

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Harikannan Ragavan (Jayadeep Hari & Jamil) for the appellant.
Mahendran Chelliah (RR Chelliah Brothers) for the respondent.

Zaleha Zahari JCA (delivering judgment of the court):

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[1] In this judgment parties will be referred as they appear in the High Court.

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[2] This is an appeal by Kumpulan Hartanah Selangor Bhd (the first defendant in the High Court) against the decision of the Kuala Lumpur High Court judge dated 14 September 2009 making them jointly and severally liable together with the second and third defendants to pay the legal fees claimed by the plaintiff in respect of a suit between the third defendant, as plaintiff, and Silver Concept Sdn Bhd ('Silver Concept'), as the defendant.

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[3] We allowed the first defendant's appeal and set aside the High Court judge's decision as against the first defendant for the following reasons.

BACKGROUND**G**

[4] The second and third defendants are wholly owned subsidiaries of the first defendant.

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[5] The following facts are not in issue. On 31 December 1997, the third defendant retained the plaintiff as solicitors to recover a sum of RM25,468,000 from Silver Concept. The civil suit instituted was Kuala Lumpur High Court Civil Suit No S2–22–09 of 1998 ('the said civil suit') where the third defendant was cited as the plaintiff and Silver Concept cited as the defendant. The said civil suit was based on instructions given by the third defendant.

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[6] It is common ground that judgment was entered against Silver Concept in favour of the third defendant for the sum of RM19,320,673.2005.

[7] On 18 July 2001 the plaintiff submitted a bill in respect of the said civil

suit to the third defendant amounting to RM2,362,500 as fees. On 28 November 2002 the third defendant made part payment of RM100,000 towards this bill. **A**

[8] On 4 April 2003 the plaintiff issued the following letter to the third defendant: **B**

Date: 4th April 2003

Brisdale Rasa Development Sdn Bhd
16th Floor Plaza Perangsang
Persiaran Perbandaran
40000 Shah Alam **C**

CONFIDENTIAL **D**

BY FAX &

Fax No: 03-55130188

Attn: En. Sofian Shamsuddin

Dear Sir, **E**

Re: Kuala Lumpur High Court Civil No. S2 (D-22-09-1998) Brisdale Rasa Development Sdn Bhd -vs- Silver Concept Sdn. & Aor

With refer to the meeting of this morning, at your office between Encik Azahar Hj Hanafi, Encik Sofian Shamsuddin, Puan Saliah, Mr. Joginder Singh and Mr. Annathurai with reference to our letter to you dated 18-7-2001 with regards to our fee of RM2,362,500.00 wherein it was confirmed that:- **F**

- (i) we will forthwith issue a bill for RM 1 million as at 2002.
- (ii) in due course we will follow up with another bill for the balance of RM1,362,500.00 which you undertake to pay forthwith upon release to you of any monies paid into Court and held by the Solicitors. **G**

Thank you.

Yours faithfully. **H**

sgd.

[9] From this letter it is clear that as at April 2003, the entity against whom the plaintiff was seeking to recover the fees in respect of the said civil suit was the third defendant not the first defendant. **I**

[10] The plaintiff's contention that the first defendant was jointly and severally liable to pay the fees of the third defendant in respect of the said civil

A suit was by reason of having issued a memorandum dated 7 July 2003 ie
exh JS5. According to the plaintiff this memorandum was to be read as an
undertaking on the part of the first defendant to pay the unpaid fees due from
the third defendant in respect of the said civil suit. This memorandum relied
upon by the plaintiff is reproduced for ease of reference. It states as follows:

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KUMPULAN HARTANAH SELANGOR BERHAD
JABATAN PEMASARAN & KOMUNIKASI KORPORAT

MEMORANDUM

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Kepada:	Puan Zaiton Bt Abd Ghani Cik Saliah Bt Abbas
Daripda:	Ahmad Azhar B. Hj Hanafi
Salinan:	YM Tengku Ab. Aziz b. Tengku Mahmud Encik Soffian b. Shamsuddin
Tarikh:	7hb Julai 2003

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BANDAR ARMADA PUTRA

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Permohonan Kontra Unit Kediaman dengan Yuran Guaman Tetuan Joginder
Singh & Co selaku peguam Tetuan Brisdale Rasa Development Sdn Bhd bagi kes
Pembelian Estet Rasa daripada Tetuan Silver Concept Sdn Bhd

(1) LATAR BELAKANG

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1.1 Tetuan Joginder Singh & Co (JSCo) adalah merupakan peguam Brisdale
Rasa Development Sdn Bhd (BRDSB) di dalam kes saman pembelian
Estet Rasa daripada Tetuan Silver Concept Sdn Bhd (SCSB).

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1.2 Pembelian hartanah di atas telah dibuat pada 31 hb Mac 1997. Sebanyak
RM7.54 juta dan RM 17.92 juta masing-masing telahpun dibayar
kepada pihak penjual dan stake holder. Disebabkan pemegang saham
tidak meluluskan pembelian di atas, maka pihak penjual dan BRDSB
telah membawa kes ini ke pihak mahkamah. Pada 15hb Mei 2002,
mahkamah telah meluluskan agar wang sebanyak RM15 juta di simpan
di dalam akaun bersama peguam-peguam BRDSB dan SCSB.

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1.3 Pada 18hb Julai 2001, Joginder Singh & Co melalui Surat biL
4342/B/JS/azn3 telah membuat tuntutan bayaran iktisas guaman
bejumlah RM2.362,500.00 bagi tugas-tugas mereka sejak 31 hb
Disember 1997 seperti di dalam Lampiran 1. Disebabkan kos ini tidak
disediakan peruntukan di dalam akaun kewangan 2002, maka beberapa
perbincangan telah di adakan dengan Joginder Singh & Co. seperti di
dalam Lampiran 11. Akhirnya mereka bersetuju untuk mengemukakan
inbois yuran iktisas guaman sebanyak RM1 juta bagi tahun 2002,
sementara bakinya sebanyak RM1.3625 juta akan dikemukakan bagi
tahun 2003 seperti di dalam Surat mereka bertarikh 4hb April 2003 di
dalam Lampiran 111.

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Pihak puan dengan ini diminta untuk berbincang dengan Tetuan Joginder Singh mengenai jumlah tuntutan yuran pengurusan sebanyak RM 1 juta. Keputusan yang di perolehi akan membolehkan tugas-tugas kontra hartanah dapat dibuat dengan firma guaman ini.

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KUMPULAN HARTANAH CEMERLANG SELANGOR GEMILANG

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t.t.

AHMAD AZHAR B. HJ HANAFI

Pengurus Besar (Pemasaran & CPC)

Our views in respect of the construction to be placed on this memorandum dated 7 July 2003 will be dealt with subsequently in this judgment.

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[11] The record shows the fees claimed by plaintiff remained unsolved in April 2006. The first defendant had by memorandum dated 28 April 2006 to the third defendant expressed the view the fees claimed by the plaintiff against the third defendant to be extremely excessive and the third defendant was advised not to proceed to contra any property or make payment against the said claim. This memorandum is also reproduced for ease of reference. It states as follows:

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KUMPULAN HARTANAH SELANGOR BERHAD

MEMORANDUM

Legal Department

To:	Ungku Amin bin Ungku Suliman, Senior Manager Sales and Marketing Division
From:	Mazlan Ahmad, Legal Manager
Date:	28.4.2006
Subject:	Kuala Lumpur Civil Suit No. S2(SI)-22-09-1998 Brisdale Rasa Development Sdn Bhd -v- Silver Concept Sdn Bhd

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We refer to your note dated 25.4.2006 in respect of the above matter.

Please be informed that the claim by Messrs Joginder Singh & Co. against Brisdale Rasa Development Sdn Bhd for the legal fees of RM2,362,500.00 is in our opinion is extremely excessive and as such you are not to proceed with any contra of property or make payment against the said claim.

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We will handle this matter and discuss with Finance Division and the Management with regards to any claim or liability against Brisdale Rasa Development Sdn. Bhd.

Yours faithfully,

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Mazlan Ahmad

[12] According to the plaintiff a meeting was held on 24 May 2006 between

A the plaintiff and the first defendant's senior management, at which meeting the plaintiff was agreeable to give a discount on the unpaid legal fees of the third defendant and also prepared to accept payment part in property and part in cash.

B [13] The plaintiff referred to this meeting in a letter dated on 30 May 2006 to the first defendant in the following terms:

Messrs Kumpulan Hartanah Selangor Berhad

C Lot IA, Level I A Plaza Perangsang

Persiaran Perbandaran 40000

Shah Alam Selangor Darul Ehsan

Attn: Encik Mazlan Ahmad

D Dear Sirs

Re: Kuala Lumpur Sivil Suit No: S2(S1)–22–09–1998 Brisdale Rasa Development Sdn Bhd -vs- Silver Concept Sdn Bhd

E We refer to the above meeting at your office on 24.5.2006 between your Legal Manager Encik Mazlan Ahmad and Mr. Joginder Singh and Mr. C.T Annathurai on our side with regards to our bill dated 18.7.2001 and your Memorandum dated 7.7.2003 wherein you advised that;

(i) you will forward our bill to your Management for its consideration for the discount you want us to give you; and

F (ii) we must be prepared to accept payment of the fees part in property and part in cash.

We thank you for your kind attention given to us and look forward to hear from you at your earliest convenient.

G Thank you.

Yours faithfully,

sgd

H c.c. Mr.C.T.Annathurai

[14] Despite this letter being addressed to the first defendant, the response came not from the first defendant but from the third defendant vide letter dated 19 June 2006 as follows:

I BRISDALE RASA DEVELOPMENT SDN BHD

Your ref: 4342/B/JS/iz2

Date: 19.6.2006

MESSRS JOGINDER SINGH & CO.

A

Advocates & Solicitors

5th Floor Wisma MLS

31 jalan Tunku Abdul Rahman

50100 Kuala Lumpur

B

Attention: Mr. Joginder Singh

Dear Sir,

Re Kuala Lumpur Sivil Suit No. S2 (SI)-22-09-1998 Brisdale Rasa Development Sdn Bhd -v- Silver Concept Sdn Bhd

C

We refer to your letter dated 30.5.2006 and 16.6.2006 in respect of the above matter.

Please be informed that the management is of the opinion that your bill dated 18.7.2001 is excessive and requested that you revise your bill.

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In the future kindly address you correspondence to Brisdale Rasa Development Sdn Bhd at the address as stated at the bottom of this letter and not to Kumpulan Hartanah Selangor Berhad.

Yours faithfully,

For Brisdale Rasa Development Sdn Bhd

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sgd

Mazlan Ahmad

[15] The plaintiff then commenced proceedings against not only against the third defendant, but also the first defendant as well as against the second defendant to recover the fees claimed. The plaintiff's case was that, notwithstanding the fact that the first, second and third defendants were separate legal entities, the first defendant had, by their conduct, undertook to pay the plaintiff's fees in respect of the civil suit and is estopped from denying liability by reason of having issued the memorandum dated 7 July 2003.

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[16] On 14 September 2009 the Kuala Lumpur High Court judge allowed the plaintiff's application against the first, second and third defendants. The learned judge held that the first defendant was liable jointly and severally to pay the plaintiff the amount claimed. The High Court's read the memorandum dated 7 July 2003 to be an undertaking by the first defendant to pay the plaintiff's fees. The learned High Court judge was of the view that this was an appropriate case for lifting of the corporate veil to make the first defendant liable for the debts of the third defendant.

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DECISION

[17] The issue for determination in this appeal is firstly, whether the High

A Court judge was right in construing the first defendant's memorandum dated 7 July 2003 as an undertaking for first defendant to pay the plaintiff's fees? Secondly, whether the High Court judge was right in lifting the corporate veil to make the first defendant jointly and severally liable for the debts of the third defendant?

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[18] After careful consideration of the facts of this case in particular the contents of the memorandum dated 7 July 2003 we are of the view that the learned judge failed to take cognizance of the fact that the entity who retained the plaintiff to institute proceedings against Silver Concept was not the first defendant, but by a separate legal entity ie the third defendant.

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D [19] On the memorandum relied upon by the plaintiff to make the first defendant liable to pay the balance of the fees claimed in respect of the said civil suit which forms the main thrust of the plaintiff's case, we regret we are unable to agree with him and are of the view that the learned judge erred in arriving at the decision which he did. Firstly, the plaintiff's contention that this memorandum was as an 'undertaking' to him to pay the balance of the fees in respect of the said civil suit was clearly misplaced. It cannot an undertaking to the plaintiff by reason of it not being addressed to the plaintiff. It was but an internal memo between the first defendant to the third defendant. This memorandum sets out the background facts leading to the plaintiff's claim for fees in respect of said civil suit. The third defendant was then advised to take the following course of action, 'Pihak puan dengan ini diminta untuk berbincang dengan Tetuan Joginder Singh mengenai jumlah tuntutan yuran pengurusan sebanyak RM 1 juta. Keputusan yang diperolehi akan membolehkan tugas-tugas kontra hartanah dapat dibuat dengan firma guaman ini'. It is abundantly clear from this sentence that as at the date of its issuance, the fees which the third defendant was prepared and liable to pay the plaintiff remained unresolved. In our view it is only upon the fees being ascertained and determined, would then the issue of how its payment is to be effected, whether it is to be effected by way of contra by way of properties arises. In other words giving effect to the contents of the memorandum dated 7 July 2003, the true position is that further discussions and negotiations is envisaged in respect of the fees to be paid to the plaintiff in respect of the said civil suit and how its payment is to be effected.

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[20] As the learned High Court judge erred in the construction to be given to the memorandum dated 7 July 2003, the question of lifting of the corporate veil warranting to make the first defendant jointly and severally liable to pay the debts of the third defendant does not accordingly arise.

[21] For the abovementioned reasons we allowed the first defendant's appeal with costs. The decision of the High Court judge as against the first defendant

is set aside. The costs of this appeal was fixed at RM8,000 to the appellant. The deposit to be reimbursed to the appellant.

Appeal allowed with costs.

Reported by Kohila Nesan

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